No. 3436

In the United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

F. M. HATHAWAY and FANNIE S. WINCHELL, as Administratrix of the Estate of V. W. Winchell, Deceased, and F. M. HATHAWAY as Administrator of the Partnership Estate of V. W. WINCHELL and F. M. HATHAWAY, co-partners, formerly doing business under the firm name and style of EUGENE FORD AUTO COMPANY,

Appellants,

vs.

FORD MOTOR COMPANY,

Appellee.

BRIEF OF APPELLEE.

Upon Appeal from the United States District Court for the District of Oregon.

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In the United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

F. M. HATHAWAY, et. al.,
Appellants,

vs.

FORD MOTOR COMPANY,
a Corporation,
Appellee.

BRIEF OF APPELLEE.

STATEMENT OF FACTS

On or about the 10th day of September, 1915, the Ford Motor Company, appellee, entered into a contract with a partnership composed of V. W. Winchell and F. M. Hathaway, which did business under the name and style of the Eugene Ford Auto Company.

By the terms of this contract the Ford Motor Company appointed the said Winchell and Hathaway as its agents within certain territory embracing a portion of Lane and Douglas Counties in the State of Oregon.

This agency contract gave to the said Winchell and Hathaway the right to sell Ford automobiles within the specified territory subject to the terms and conditions therein set forth.

The contract provided, amongst other things, that either party might cancel the same with or without cause upon giving to the other party written notice by registered mail.

On the 25th day of May, 1916, the Ford Motor Company cancelled the contract between itself and the said Messrs. Winchell and Hathaway, in the manner outlined therein.

On or about the 3rd day of June, 1916, the Ford Motor Company filed an action in replevin to recover the possession of certain described Ford automobiles which had been consigned to Messrs. Winchell and Hathaway under the terms of said contract.

The theory of the Ford Motor Company in this action of replevin was founded on the premise that under the contract between the Ford Motor Company and the said Messrs. Winchell and Hathaway, the title to all automobiles consigned remained in the Ford Motor Company until their actual sale to the ultimate user.

The replevin action referred to was tried in the District Court of the United States for the District of Oregon, on the 11th day of September, 1916, and a judgment was entered against the Ford

Motor Company, which judgment awarded to the said Messrs. Winchell and Hathaway the amount of their advancements upon the cars sought to be replevined, together with $6000.00 damages.

Upon this trial the Court in effect ruled against the theory of the Ford Motor Company, according to which it contended that the title to all cars consigned under the contract remained in itself until the sale to the ultimate user, and also held that it had failed to make out a technical case of replevin.

This replevin case was appealed to the Circuit Court of Appeals for the Ninth Circuit, and was there affirmed, upon the theory that the Ford Motor Company had omitted the performance of the statutory conditions necessary to be performed in order to maintain an action of replevin.

This case is reported in 245 Fed. 850.

Prior to the appeal of the replevin action referred to there had been instituted an action by one Benjamin E. Boone against the Ford Motor Company, which proceeding questioned the right of the Ford Motor Company to cancel its agency contracts, as therein provided, and likewise questioned the validity of the provisions of the contract reserving title in the Ford Motor Company until such time as the automobiles delivered under the contract reached the hands of the ultimate user.

In this latter case, the United States District Court held against the contentions of the Ford

Motor Company, and the case was eventually appealed to the Circuit Court of Appeals for the Ninth Circuit, which court reversed the decision of the lower court, and held that the agency contract used by the Ford Motor Company was a valid and binding contract, and sustained its provisions.

This latter case is reported in 244 Fed. 335.

The contract involved in the case last referred to was identical with the contract involved in the case of Ford Motor Company vs. Winchell and Hathaway, and consequently identical with the contract involved in the present controversy.

The effect of the decision in this last case was to hold that the title to cars consigned under the agency contract between the Ford Motor Company and Messrs. Winchell and Hathaway did not pass from the Ford Motor Company upon the delivery of the cars to its agents, and that, therefore, if the contract was cancelled between the date of the delivery of the cars to the agent, and the sale thereof to the ultimate user, the title would be in the Ford Motor Company at the time of cancellation.

At the time when the automobiles involved in the replevin action referred to were delivered to Messrs. Winchell and Hathaway, the said Messrs. Winchell and Hathaway procured from the First National Bank of Eugene, Oregon, a loan of money to lift the bills of lading outstanding upon the machines consigned, and delivered to the said First National Bank of Eugene, Oregon, chattel mort-

gages upon the machines in controversy in the said replevin action to secure the payment of the loan referred to.

In connection with the institution and maintenance of its replevin action and in order to relieve the title to the cars therein involved from the lien created by these chattel mortgages, the Ford Motor Company paid to the First National Bank of Eugene, Oregon, the sum of $12,676.25, being the balance due upon the notes secured by these chattel mortgages, and thereby procured a cancellation of the notes and mortgages.

After the replevin action was decided in favor of the said Messrs. Winchell and Hathaway, and the sum of $22,077.50 awarded to them, which amount was composed of $16,077.50 as the value of the cars, and $6000.00 damages, the Ford Motor Company sought to procure from Messrs. Winchell and Hathaway by way of offset, or otherwise, the sum of $12,676.25, which it had paid to the First National Bank of Eugene, Oregon, to secure a release of said cars from the lien of said chattel mortgage.

Messrs. Winchell and Hathaway refused to pay to the Ford Motor Company the said sum of $12,-676.25, or to allow to the Ford Motor Company any credit for said amount of money upon the accounts between them, and the Ford Motor Company was compelled to pay to Messrs. Winchell and Hathaway the full amount of said replevin judgment.

For this reason the present suit was instituted

to recover from Messrs. Winchell and Hathaway and the Eugene Ford Auto Company the said sum of $12,676.25, by having the Court decree that the Ford Motor Company is entitled to be subrogated to the First National Bank of Eugene, Oregon, as against the makers of the chattel mortgage referred to.

To the complaint filed by the Ford Motor Company, the appellants filed an answer setting up generally the history of the transactions between the parties as above outlined, and alleging that the payment to the First National Bank of Eugene, Oregon, was a voluntary payment without the consent of the said Messrs. Winchell and Hathaway and that, therefore, the Ford Motor Company was not entitled in law to be indemnified against said payment or any portion thereof, and further set up certain counter-claims in the form of unpaid rebates alleged to be due to the said Messrs. Winchell and Hathaway.

The Ford Motor Company filed a reply making an issue as to the amount of rebates alleged to be due.

Upon the issues thus joined the question presented to the lower court for decision and now presented to this Court for review upon appeal is as follows:

Should the appellants be allowed to retain the sum of $12,676.25, which they received from the First National Bank of Eugene, Oregon, and at the

same time retain the benefit derived from the payment of this very sum to the First National Bank of Eugene, Oregon, by the Ford Motor Company, which payment was made by the Ford Motor Company to relieve the machines involved in the replevin action from the lien of a mortgage created by the appellants?

In other words, should the appellants be allowed to receive and enjoy the double payment of the sum of $12,676.25?

The trial court held that the appellants should not be entitled to a double payment of this sum of money, and that the Ford Motor Company was entitled to be subrogated to the bank as against the makers of the mortgages.

The entire brief submitted on behalf of the appellants is devoted to an attempt to establish that the appellants are entitled to retain the sum of $12,676.25, although they have neither given nor paid any consideration therefor.

It is, therefore, apparent from a mere statement of this case that the equities are strongly against the appellants and we shall endeavor to point out from the record here presented that the decree entered by the lower court is justified by the law and the facts.

ARGUMENT

It is admitted in the case at bar that the appellee paid to the First National Bank of Eugene, Oregon, the sum of $12,676.25 in satisfaction of certain notes and chattel mortgages, which the appellants had given to said bank, and which mortgages constituted a cloud upon the title to the Ford automobiles which were involved in the replevin suit instituted by the appellee against the appellants.

Under the provisions of Section 13 of the Agency contract between the Ford Motor Company and Messrs. Winchell and Hathaway the latter had an equitable lien upon each automobile consigned under said contract to the extent of eighty-five per cent. of the purchase price advanced.

This section of the contract appears at the bottom of page 15 of the transcript of record, and reads as follows:—

> "Second party shall have a lien on each Ford automobile for the eighty-five per cent (85%) advanced by him on the same, and for freight paid by him on the same, and he shall keep and maintain insurance so as to protect himself against loss."

It, therefore, follows that at the time when Messrs. Winchell and Hathaway placed the chattel

mortgages upon the automobiles consigned to them to secure the payment of their notes to the First National Bank of Eugene, Oregon, in the sum of $12,676.25, they had an equitable interest or lien upon the automobiles, which they could mortgage to the bank, and it was for the purpose of relieving the title to the automobiles from such equitable lien that the appellant paid this amount to the bank.

It furthermore appears that at the time when the chattel mortgages under discussion were placed upon the automobiles involved in the replevin action that Messrs. Winchell and Hathaway were still the agents of the Ford Motor Company under the existing contract, and when the Ford Motor Company paid the $12,676.25 secured by these mortgages to the First National Bank of Eugene, Oregon, for the purpose of relieving the title to the cars from the equitable lien referred to, it recognized, in effect, that its agents in possession had imposed upon said automobiles an equitable lien which could be enforced by the Bank of Eugene, even though it could not be enforced by Messrs. Winchell and Hathaway, because the bank had obtained said lien for value, erroneously believing the legal title of the cars to be in Messrs. Winchell and Hathaway (see page 218, Transcript of Record), and the Ford Motor Company further recognized that such cloud on its title would have to be removed in order to enable it to perfect its replevin action.

Instead of taking legal steps to remove such cloud the Ford Motor Company adopted the shorter method of making the payment in controversy.

Mr. F. C. McDougal, a witness called on behalf of the appellee, after testifying that he was one of the attorneys for the Ford Motor Company at the time of the institution of the replevin action, was asked the following question:—

> Q. Now, in connection with that proceeding a payment was made, if you recall, to the First National Bank of Eugene, Oregon, of the sum of $12,676.38. I wish you would state the reason and purpose of making that payment by the Ford Motor Company.

Objection by Mr. Smith.

> A. Well, it was for the—the payment was made to the bank for the purpose of relieving this lien which the firm of Winchell and Hathaway had placed upon the automobiles in the way of a mortgage.

(Transcript of Record, p. 222.)

Mr. P. E. Snodgrass, one of the witnesses called on behalf of the appellants, after testifying that he was president of the First National Bank of Eugene, Oregon, and further testifying that he had knowledge of the circumstances surrounding the payment to the said bank of the $12,676.25 in controversy, was interrogated upon cross-examination as follows:—

> Q. Now, Mr. Snodgrass, when you said that this loan was made upon the individual

credit of Messrs. Winchell and Hathaway—I understood you to say it was. That is correct?

A. Yes, sir.

Q. Then, why was it necessary for the bank to take a chattel mortgage on these cars?

A. That would be additional security.

Q. Additional security to the credit of Winchell and Hathaway?

A. In addition to their personal credit same as we frequently take security from people that we loan to.

* * * * *

Q. I also understood you, didn't I, that you really don't know whether or not they objected to the payment of this amount—that is Messrs. Winchell and Hathaway?

A. They didn't make any objection to the bank. I am sure they made no objection.

Q. Has the amount evidenced by these notes and mortgage ever been paid to the bank by Messrs. Winchell and Hathaway in addition to the payment made by the Ford Company?

A. It has not.

Q. Then, in so far as the records of the

bank show, and in so far as the real facts are, Messrs. Winchell and Hathaway have received some twelve thousand odd dollars—the exact amount I have not just before me; whatever the amount of the payment of the Ford Motor Company was—from the bank as a loan and likewise received the benefit of the payment to the bank by the Ford Company. That is a fact, is it not?

* * * * *

A. The amount as evidenced by the notes was advanced to Hathaway and Winchell. The notes were paid by the representatives of the Ford people, and the bank has not received any other payment.

* * * * *

Q. Now, just how soon after the payment of these notes by the Ford Motor Company, or the money that was tendered to the bank and accepted by the bank, did they come back and make this request on you which you have referred to for a change of the bank's record?

A. Well, I couldn't tell you the exact number of days or weeks. As near as I can remember it will be several days, perhaps a month or even more.

Q. I was not quite clear in your direct testimony, or I did not quite understand the exact statement which you say was made to the Ford

Company at that time. Will you restate that, please, with reference to the changing of your records. What was the request?

A. They requested that we change our endorsement our paid stamp endorsements on the notes.

Q. To what?

A. And make a transfer of the notes to them instead of cancellation of the notes.

Q. That is an assignment of the notes and security to the Ford Motor Company?

A. An assignment of the notes to the Ford Motor Company instead of cancellation of the notes as paid.

Q. And likewise an assignment of the mortgage?

A. Yes.

Q. And what was the reason that the bank refused to conform to that request?

A. Well, I told them that we had closed the transaction and that we would not now, after the question had gone into court and been raised, be a party to the changing of our records and be put in that position. Between ourselves and our customers we are in court. The records and the cancellation must stand.

Q. Why did the bank accept the money at that time?

A. We were acting under the advice of our attorney who knew that there was a controversy, and the question being raised as to the ownership of the cars, and he advised us if they wanted to pay the notes, to accept it.

(Transcript of Record, pp. 217-221.)

It is also admitted by the record in this case that the contract under which the parties operated and which is set forth on pages 9 to 36, inclusive, of the transcript of record, is in effect the same contract which was construed by this court in the case of Ford Motor Company vs. Benjamin E. Boone, **244 Fed. 335,** in which case the validity of said contract was upheld and said contract was construed as leaving the title to all cars consigned thereunder in the Ford Motor Company until the same were finally sold to the ultimate user.

The above record establishes that the payment of the $12,676.25 to the First National Bank of Eugene, Oregon, was made by the Ford Motor Company for the purpose of aiding its replevin action, by relieving the title to the cars sought to be replevined from the equitable lien created thereon by Messrs. Winchell and Hathaway, and the purpose and intention of the Ford Motor Company in making this payment is positively established by its act in returning to the bank, and seeking to procure from the bank, an assignment of the notes and security

so as to keep alive, as against Messrs. Winchell and Hathaway the obligation which they had imposed as a cloud upon the property of the Ford Motor Company.

The testimony of the bank's president in this particular is doubly convincing because it comes from the lips of the appellants own witness.

In view of this record, we respectfully submit that the act of the Ford Motor Company in paying the $12,676.25 was not the act of a volunteer paying the debt of a third party in which it had no interest.

The finding and conclusion of the trial court upon this branch of the case, which is the main question involved, is so clear, concise and accurate that we here quote it as the correct and only rule applicable to this appeal:—

> "Under the contract between the plaintiff and defendants as interpreted by the Court of Appeals in the Boone case (244 Fed. 335) the title to the automobiles was in the plaintiff notwithstanding the defendant had advanced and paid to it the entire amount it was entitled to receive under the contract. It therefore had an interest in the property which it could protect by paying the lien. It thus made the payment to the bank in good faith believing that it was necessary to do so in order that it might recover possession of its property, and to enable it to proceed with the replevin action. Having done so it is, in my opinion, entitled to

be subrogated to the bank as against the makers of the mortgage. (37 Cyc. 378)."

(Brief of appellants, p. 59.)

The only answer offered by the appellants to the above record and the above finding and conclusion of the trial court is that the matters involved in this case could have been tried and determined in the action of replevin between the same parties, and they cite a number of cases, as well as the new Federal statute authorizing the interposition of equitable defenses in actions at law, as the basis of their contention.

An examination, however, of the record in this case as well as the transcript of record in the case of Ford Motor Company vs. E. A. Farrington, et. al., which was introduced in evidence as "plaintiff's exhibit 3," and which pursuant to a stipulation of the parties, has been transmitted for use upon his appeal, will disclose that upon the trial of the replevin action the Ford Motor Company endeavored to present for determination the question of its right to recover the $12,676.25 in controversy, but that that question was expressly eliminated from consideration in the case by the ruling of the court, and that such ruling was based upon the motion and objection of Mr. Isham Smith, who now appears as attorney for the appellants in this case, and urges that this same matter, which he himself eliminated from the replevin action, cannot now be considered because it should have been adjudicated in that case.

These rulings and motions appear upon pages 175, 202, 301, and 314 of the transcript of record in the case of Ford Motor Company vs. E. A. Farrington, et. al., introduced in evidence in this case, and transmitted to this court as "plaintiff's exhibit 3."

In view of the above record, and in view of the further fact, (as shown by the testimony of Mr. Hugh Montgomery appearing upon pages 211 and 212 of the transcript of record) that the Ford Motor Company was compelled to pay the full judgment in the replevin action without obtaining any satisfaction of its claim for the $12,676.25, the trial court concluded as follows:—

> "The right of the plaintiff by reason of such payment was not at issue in the replevin action and was not and could not have been tried therein, nor was the right of the defendants to recover the deposits made by it or the unpaid commissions involved in such action. The only question in that case was the value of the property taken by the plaintiff under the writ of replevin in case it could not be returned, and damages for such unlawful taking."
>
> (Brief of Appellants, page 59.)

We respectfully submit that the above rule is the only rule which is properly applicable to the facts of the case at bar, and that the peculiar facts of the case at bar, and particularly the act of the appellants in excluding the subject matter of the present controversy from consideration in the replevin

action, distinguishes the present case from all of the adjudications cited by the appellant in support of its contention that the present controversy should have been disposed of in the prior replevin action.

This disposes of the two main propositions advanced by the appellants to the effect that the payment of the $12,676.25 was a voluntary payment, and that the subject matter of the present controversy should have been determined in the prior replevin action.

In addition to these main contentions the appellants have advanced two minor propositions, in substance as follows:—

First, that the record does not show that the title to the cars involved in the replevin action was in the Ford Motor Company, and **Secondly,** that the trial court made an improper allowance on the subject of rebates.

The first contention is disposed of by the fact that the contract between the parties, as construed by the Circuit Court of Appeals in the case of Ford Motor Company vs. Benjamin E. Boone, 244 **Fed.** 335, reserved title to the cars in the Ford Motor Company, and the further fact that Mr. F. M. Hathaway, one of the appellants in this case, testified as shown on page 232 of the transcript of record, that the Ford automobiles involved in the present controversy were purchased under this very form of contract.

The second proposition referred to, involving the subject of rebates, complains of the fact that the court credited the Ford Motor Company with a check in the sum of $987.48, which was issued prior to the institution of the replevin case, but the check referred to, as shown by the testimony of Mr. George W. Alling appearing upon page 236 of the transcript of record, was credited on the entire account involving the subject of rebates between the Ford Motor Company and Messrs. Winchell and Hathaway, and it appears that this rebate account was a general account covering the entire contract period and not a specific account covering the cars involved in the replevin case.

In addition to this criticism of the court's allowance, the appellants now attempt, as shown on page 22 of their brief, to assert that the court made another error in not figuring the entire amount of rebate money due as $3,401.12 instead of $2,325.58, as shown by the testimony of Mr. Alling upon page 236 of the transcript of record.

This latter criticism of the trial court's ruling is based upon some transposition of figures found in the original record of the replevin case, but the inaccuracy of the appellants' criticism in this particular is established by the fact that in their own answer filed in the present case they claim as the amount of rebates due the sum of $1,900.60, (see prayer of answer, page 161, transcript of record), whereas in their brief they claim as the amount due the sum of $3,401.12 less a draft of $987.48. (See brief of appellants, page 22.)

We respectfully assert that there is no evidence in the record to support this last contention of the appellants, and the only evidence directly bearing upon this question is the testimony of Mr. Alling, the accountant of the Ford Motor Company, appearing upon pages 235 and 236 of the transcript of record, and according to this testimony the total amount of rebates due at the date of the trial of this case as shown by the records of the Ford Motor Company was $2,325.58 less $987.48.

These were the figures used by the trial court as shown in the last paragraph of his decision, and by these figures the trial court gave to the appellants $424.98 more by way of rebates than was called for by the prayer of the appellants' answer.

We, therefore, urge that the appellants are in no position to complain regarding the court's action in this particular.

Very respectfully submitted,

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Attorneys for Appellee.